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RIGHT TO BAIL FOR JUVENILES

The Illinois Juvenile Court Act[1] makes no provision for an absolute right of release from custody on bail.[2] It provides:

> If the court finds that it is a matter of immediate and urgent necessity for the protection of the minor or of the person or property of another that the minor be detained or that he is likely to flee the jurisdiction of the court, it may prescribe detention or shelter care and order that the minor be kept in a suitable place designated by the court; otherwise it shall release the minor from custody.[3]

In contrast, the adult criminal defendants have an absolute right of release except when death is a possible punishment,[4] and factors similar to those above are important only in determining the amount of bail.[5]

The purpose of this note is to examine this disparity in the light of current constitutional trends which have characterized the juvenile process as essentially criminal where the basis of the preceeding is the violation of a statute which would result in a criminal prosecution if the juvenile were an adult.[6]

INTRODUCTION

Until the landmark decision of *In re Gault*,[7] the juvenile courts operated under the laudable presumption that:

> [S]ociety's role was not to ascertain whether the child was guilty or innocent, but [w]hat is he, how he has become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.[8]

To this end criminal procedures were inapplicable. In its dealings with the child, the state was merely occupying the shoes of the real parent. Thus a child had a right not to liberty but to custody.

> The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as *parens patriae*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there and the court with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there.[9]

[1] Ill. Rev. Stat. ch. 37, § 701-2 (1969).

[2] Thus it is misleading to state that there is no right to bail. *E.g.*, Feldman, *The Prosecutor's Special Tasks in Juvenile Proceedings in Illinois*, 59 Ill. Bar J. 146, 149 (1970).

[3] Ill. Rev. Stat. ch. 37, § 703-6 (2) (1969).

[4] Ill. Rev. Stat. ch. 38, § 110-4 (a) (1969).

[5] Ill. Rev. Stat. ch. 38, § 110-5 (1969).

[6] *See* In the Matter of Samuel Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[7] 387 U.S. 1 (1967).

[8] *Id.* at 15.

[9] Commonwealth v. Fisher, 213 Pa. 48, 53, 62 A. 198, 200 (1905).

The juvenile process was characterized as civil,[10] rather than criminal since its goals were rehabilitative and beneficient rather than punitive.[11] Enlightened and humanitarian as these goals might have been, the President's Commission reported in *The Challenge of Crime in a Free Society*:

> The limitations, both in theory and in execution, of strictly rehabilitative treatment methods, combined with public anxiety over the seemingly irresistible rise in juvenile criminality, have produced a rupture between the theory and the practice of juvenile court dispositions. While statutes, judges, and commentators still talk the language of compassion and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders too. These are society's ultimate techniques for protection against threatening conduct; it is inevitable that they should be used against threats from the young as well as the old when other resources appear unavailing.[12]

If the juvenile system has in fact come to serve the same function as the criminal system, should the juvenile not be accorded all the same rights and privileges as adult criminals?

Constitutional Right to Bail

The requirement of collateral before one may be released from custody serves to insure the presence of the accused at the trial, but also preserves the presumption of innocence and prevents the infliction of punishment prior to conviction.[13] The eighth amendment provides that "[e]xcessive bail shall not be required. . . ."[14] This part of the amendment has never been held applicable to the states. Whether in federal proceedings the amendment imports an absolute right to bail or only prohibits excessive bail in those cases where bail has been otherwise granted at the discretion of the judge or by statutory authority is unclear.[15] A dearth of definitive cases concerning the right to bail exists. This situation exists because denial of bail, not being a part of due process, cannot render a proceeding void unless other factors are involved.[16] Further impedi-

[10] *See, e.g.*, Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959), for a good summary of the jurisdictions so holding.

[11] Gault, 387 U.S. 1 at 15.

[12] *The Challenge of Crime in a Free Society* 80 (1967), hereinafter cited as President's Challenge.

[13] Trimble v. Stone, 187 F. Supp. 483, 485 (D.D.C. 1960).

[14] U.S. Const. amend. VIII.

[15] *See* Stack v. Boyle, 342 U.S. 1 (1951), where the right to bail was based on a federal statute, not the eighth amendment. If the eighth amendment doesn't confer an absolute right to bail, the result would be a limitation on bail not being excessive in those cases where it was otherwise granted, but such a limitation would have no meaning, for bail could be denied altogether, and this denial would not be termed excessive.

[16] *See, e.g.*, Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970), where a juvenile who was denied bail was released because detention interfered with the preparation of his defense, and would result in an unfair trial; Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967), where dictum was expressed to the effect that a juvenile can test the validity of his detention if essential treatment is not available or if he is being held in an institution housing adult criminals.

ments to substantive decisions are that the bail issue may be rendered moot by a finding of delinquency,[17] and that a denial of bail may be deemed an interlocutory order which is not appealable under the Illinois Juvenile Court Act.[18]

Most pre-*Gault* decisions have held that no right to bail exists for juveniles[19] because the proceeding is civil not criminal, because the detention is rehabilitative not punitive, and because as against the state in its capacity as *parens patriae* the child only has a right to custody, not liberty. *Gault* rejected this type of reasoning. As a result of *Gault*, three lower state courts have found that juveniles have the right to bail.[20] However, Chief Judge Bazelon of the Court of Appeals for the District of Columbia, in a post-*Gault* decision, refused to consider the question of a constitutional right to bail for juveniles since "an adequate substitute for bail is provided by the District of Columbia Juvenile Court Act . . . if faithfully observed in practice."[21] The Act provided that the child shall have a detention hearing and shall not be removed from the custody of his parents "except when his welfare or the safety and protection of the public cannot be adequately safeguarded without his removal."[22] Existing provisions were also found adequate in *Baldwin v. Lewis*,[23] where the statute[24] was silent as to any standards for release from custody but where the statute was construed to provide for release unless "parents or guardian of the juvenile are incapable under the circumstances to care for him."[25]

Inevitably, if this approach were taken in Illinois, existing procedures would also be found to be an adequate substitute. However, the bail clause of the Illinois Constitution does not suffer from the same vague language as the eighth amendment. Article II, Section 7 provides that "[a]ll persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great . . . ."[26] This section should confer a right to

17 In re Orr, 38 Ill. 2d 417, 231 N.E.2d 424 (1967), *cert. denied*, 391 U.S. 924 (1968).

18 Ill. Rev. Stat. ch. 37, § 701-20 (3) (1969).

19 Cinque v. Boyd, 121 A. 678 (Conn. 1923); A.N.E. v. State, 156 So. 2d 525 (Fla. App. 1963); *Ex Parte* Cromwell, 232 Md. 305, 192 A.2d 775 (1963); *Ex Parte* Walters, 221 P.2d 659 (Okla. App. 1950); Espinosa v. Price, 144 Tex. 121, 188 S.W.2d 576 (1945). *Contra*, Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); State v. Franklin, 262 La. 439, 12 So. 2d 211 (1943); *Ex Parte* Osborne, 127 Tex. Crim. 136, 75 S.W.2d 265 (1934), which was distinguished in Espinosa v. Price, *supra*.

20 Smith v. McCravy, No. 108809 (Jefferson County Ct., Kentucky, 1967); Wisconsin *ex rel* Mayberry v. Administrator, (Waukesha County Ct., 1967); Wisconsin *ex rel* Wronski v. Frohmader, No. 349-590 (Milwaukee Cir. Ct., 1967).

21 Fulwood v. Stone, 394 F.2d 939, 943 (D.C. Cir. 1967).

22 *Id.*

23 300 F. Supp. 1220 (E.D. Wis. 1969).

24 Wis. Stat. sec. 48.29 (1967). A statute providing for bail for juveniles was removed from the Wisconsin Children's Code in 1956.

25 Baldwin v. Lewis, 300 F. Supp. 1220, 1233 (E.D. Wis. 1969).

26 The provision regarding bail in the Illinois Constitution of 1970, Art. I, Section 9, remains substantially unchanged. *Cf.* Ky. Const. § 16 under which bail was granted to juveniles in Smith v. McCravy, n.20 *supra:*

> All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or presumption great.

bail if delinquency may be termed an "offense" since all persons accused of non-criminal "offenses" have a right to bail. A delinquent minor is defined in the Juvenile Court Act[27] as one who:

> [H]as violated or attempted to violate, regardless of where the act occurred, any federal or state law or municipal ordinance; and (b) any minor who has violated a lawful court order made under this Act.[28]

The term "offense" has been defined as the "transgression of any law"[29] or the "violation of a law."[30] These definitions seem to be broad enough to bring delinquency within the meaning of offense as used in Article II, Section 7.

Denial of Bail as Violation of Equal Protection

A right granted to one group may not be withheld from another group similarly situated, unless a justifiable basis for treating the two groups differently exists with respect to the subject matter of the legislation.[31] The adherents of the *parens patriae* doctrine have maintained that this justifiable basis is that the juvenile process is a civil proceeding designed not to punish but to rehabilitate and that the adjudication of delinquency is not a conviction. In this regard the Supreme Court has observed:

> The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of the court and institutional routines.[32]

> A proceeding where the issue is whether the child will be found "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.[33]

In short the civil-rehabilitative labels can serve as no distinction upon which juveniles may be denied bail, for both face the loss of liberty no matter what the process may be called.

Two arguments frequently have been used to justify not granting bail to juveniles. Some argue that a valid distinction may be made in that money bail would not insure the juvenile's appearance at the adjudicatory hearing because he has no property interest in the money put up in his behalf, and has no family responsibilities which would deter him from fleeing the jurisdiction.[34] Others argue that if bail would be granted, the right to be released would depend solely on the economic status of the parents.[35]

[27] Ill. Rev. Stat. ch. 37, § 701-2 (1969).
[28] Ill. Rev. Stat. ch. 37, § 702-2 (a), (b) (1969).
[29] Moore v. Illinois, 55 U.S. 13, 19 (1852).
[30] People v. Talbot, 322 Ill. 416, 422, 153 N.E. 693, 696 (1926).
[31] *See* Griffin v. Illinois, 367 U.S. 643 (1961).
[32] 387 U.S. at 30.
[33] *Id* at 36.
[34] *See generally* Linklater, Zana, *Constitutional Law—Due Process—Juvenile Courts: Specific Due Process Guarantees Extended to Accused Delinquents in State Juvenile Court Proceedings*, 56 Ill. Bar J. 320, 330 (1967).
[35] Fulwood v. Stone, 394 F.2d 939, 943 (D.C. Cir. 1967). *Cf.* Black v. United States, 355 F.2d 104, 106 (D.C. Cir. 1965).

A property interest of the accused in the collateral is not essential to the present functioning of the bail system. A complete lack of a property interest in the collateral exists in those states which have the bond system. In these states the released person sacrifices his money to the bondsman as a fee for getting released and appears or does not appear for reasons other than a property interest. In Illinois the bond system has been abolished, but a property interest in the collateral may still be lacking where a third person, not the released person, deposits the collateral. The juvenile's parent or guardian who usually post the juvenile's bail would be in a much better position to control and supervise the juvenile than would the person who posts bail for another adult.

The juvenile's lack of family responsibilities, if indeed true, should be no reason for denying bail. The bail system is inconsistent when hardened criminals and convicted bail-jumpers who are not accused of a capital offense may be admitted to bail, but the juvenile may not be admitted to bail because he may flee the jurisdiction.

As for release depending on the parent's financial position, the disparity in wealth among adults, friends, or relatives has never been a reason to deny adults bail. Why should it be a reason to deny it to juveniles?

Finally, juveniles have the right to bail in Illinois if they are tried by an adult court by virtue of the juvenile court waiving its jurisdiction over the juvenile[36] or never having jurisdicition in the first place.[37] The above mentioned considerations presumably have no application when the juvenile is tried in an adult court. Should these considerations have any more application in cases before the juvenile court?

The Implications of In the Matter of Samuel Winship

In the Matter of Samuel Winship[38] the Court held that an adjudication of delinquency must be by the criminal standard of beyond a reasonable doubt, not by a mere preponderance of the evidence. After finding the criminal standard to have constitutional stature, the Court stated that to afford juveniles the protection of the standard would not "risk destruction of the beneficial aspects of the juvenile process"[39] or "compel the States to abandon or displace any of the substantive benefits of the juvenile process."[40] These beneficial aspects which would not be affected by the *Winship* holding were enumerated as follows:

> [T]hat a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential.

[36] Ill. Rev. Stat. ch. 37, § 702-7 (3), (5) (1969).

[37] Ill. Rev. Stat. ch. 110A, § 553 (d) (1969), which provides for bail for persons under 18 charged with traffic offenses.

[38] 397 U.S. 358 (1970).

[39] *Id.* at 366.

[40] *Id.* at 367; 387 U.S. at 21.

> Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings which are employed prior to the adjudicatory hearing.[41]

Likewise, the beneficial aspects of the juvenile process will not be disturbed by granting juveniles in Illinois the right to bail. Granting juveniles the right to bail will in no way alter the practice of the juvenile court to look to the treatment, reformation and rehabilitation of the child, and will not serve to impose a sort of punishment on him which could be construed as criminal punishment. Indeed, detention without bail would be more punitive, and might stigmatize the child even before he was adjudicated a delinquent.[42] Bail would have no effect on the child's subsequent right to hold a position of trust, for this right depends on whether the court decides to release information regarding the child's appearance before the court.[43] Confidentiality pending the adjudicatory hearing would be increased since the child released on bail could continue his education without having to explain his absences from school.[44] Granting bail would not encumber the juvenile process, for the decision to grant bail could be incorporated into an already existing procedure—the detention hearing.[45] The release of the juvenile on bail would unclog the courts' calendars. If the child is detained, he must have an adjudicatory hearing within 10 days; whereas if he is released, the hearing may be held within 30 days.[46]

Presently in Illinois, the burden of showing that certain factors exist which warrant the detention of the child is on the prosecution.[47] If the bail were to be granted as a right, the burden of proof might come to rest on the child. That is, the burden might devolve upon the child to show that he should be released without bail or for a lesser amount. If this result were to occur, the effect would

[41] 397 U.S. 358, 366, 367 (1970).

[42] If the juvenile is innocent, his detention would be viewed as unfair, and would instill a sense of hostility and bitterness in the child. *See also* Studt, *The Client's Image of the Juvenile Court*, in Justice for the Child 200, 211-214 (M. Rosenheim ed. 1962) to the effect that detention would not only have an effect on the child, but also on the parent. The court's arbitrariness in denying bail may be viewed by the parent as a usurpation of the parental function indicating self-worthlessness. They cease performing their guidance duties adequately, and their children consequently lose respect for them. As a result, parents perform even more inadequately because of further loss of esteem. This vicious circle effectively obliterates the potentially valuable contribution the parents can make to treatment.

[43] *See generally* Ill. Rev. Stat. ch. 37, § 702-9 (1969).

[44] *See* Steigman, *Detention Hearing*, in Illinois Juvenile Practice 3-1, 3-17, 18 (Illinois Institute for Continuing Legal Education 1971), to the effect that detention may be disruptive of schooling forcing forfeiture of an entire semester's work, or causing the juvenile to believe that the only course available to him is to drop out.

[45] *See generally* Ill. Rev. Stat. ch. 37, § 703-6 (1969).

[46] Ill. Rev. Stat. ch. § 704-2 (1969). *See also* Steigman, *Detention Hearing*, in Illinois Juvenile Practice 3-1, 3-17, 18 (Illinois Institute for Continuing Legal Education 1971), to the effect that detention centers are overcrowded and inadequately supervised, so that the child may be forced to associate with hardened criminals and submit to deviate sexual assaults.

[47] Ill. Rev. Stat. ch. 37, § 701-2 (1969).

be that those who are now released reluctantly into the custody of their parents might be required to post a minimal amount of bail. To avoid the possibility and to secure for the child the best of both worlds,[48] the present practice of releasing the child, unless one of the factors warranting detention is found to exist, should be continued. When one of these factors is found however, the right to be released on bail should attach. The effect of this procedure would be that those who are presently released would continue to be released and those that are presently detained would have the right to bail.

Some reason exists to believe that detention has been the rule rather than the exception although stated policy is directly contrary to this proposition.[49] The President's Commission has observed:

> Detention appears to be far too routinely and frequently used for juveniles both while they are awaiting court appearances and during the period after disposition and before institution space is available. In theory a juvenile is detained only when no suitable custodian can be found or when there appears to be a substantial risk that he will get into more trouble or hurt himself or someone else before he can be taken to court. A study for the Commission found, however, that in 1965 two-thirds of all juveniles apprehended were admitted to detention facilities and held there an average of 12 days.[50]

One explanation of this phenomenon is that detention without the right of bail is used as a "shock treatment" rather than as protection of the child or the community.[51] This conclusion seems to find support in the growing number of cases where the findings of the trial court were found to be insufficient to warrant detention.[52] If juveniles were given the right to bail[53] the present abuses might be answered by withdrawing from the court the absolute right to detain.

[48] *Cf.* Kent v. United States, 383 U.S. 541, 556 (1966); "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."

[49] Ill. Rev. Stat. ch. 37, § 701-2 (1) (1969).

[50] President's Challenge, 87 (1967).

[51] *See Task Force Report: Juvenile Delinquency and Youth Crime, President's Commission on Law Enforcement and Administration of Justice,* 13 (1967).

[52] Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969); Fulwood v. Stone, 394 F.2d 939 (D.C. Cir. 1967); In re M., 89 Cal. Rptr. 33, 473 P.2d 737 (1970) where at 747, n.24 the court pointed out factors which are not relevant to the decision of whether the child should be detained:

(1) Public outcry against the offense allegedly committed by the minor;
(2) The need to crack down generally on juveniles in the area;
(3) The nature of the offense per se;
(4) The belief that detention would have a salutary effect on the minor (the juvenile court does not have the right to exercise its jurisdiction over a minor for this purpose, if at all, until the adjudication of wardship or dependency has been made);
(5) Convenience of the police, the probation officer, or the district attorney for investigation purposes;
(6) Concern that the minor will fabricate a defense to his case;
(7) Inability of the minor to show good cause why he should be released;

and In re Macidon, 49 Cal. Rptr. 861 (1966).

[53] In England bail is acknowledged as of right to children pending their hearings. Henriques, *Children's Courts in England,* 37 J. Crim. L.C. & P.S. 295, 296 (1946).

CONCLUSION

With the failure of the juvenile court movement in its non-punitive approach and with the characterization of the juvenile process as criminal for certain purposes, a consideration of the total rights of the juvenile is needed. If the end result of the juvenile process is possible loss of liberty, should the juvenile's rights be any more limited than those of adults?

Although the eighth amendment of the federal Constitution has never been held by the United States Supreme Court to confer an absolute right to bail in the state or federal proceedings, to view the amendment as only a limitation on excessive bail and to permit bail to be denied altogether seems to change the meaning of the amendment.

Under the Illinois Constitution there is ample ground for conferring a right to bail on juveniles. The denial of bail to juveniles, but not to adults, may constitute a violation of equal protection. To detain juveniles without bail is in effect to put them in the same category, for purposes of bail, as adults accused of murder against whom there is strong evidence.

The right to bail for juveniles in Illinois would seem to have no destructive effect on the unique benefits of the juvenile system which testify to its worthiness and probably justify its retention.

Some evidence exists that detention without bail has been used as shock treatment and not for the avowed purposes of protecting the community or the child. One way of curbing these abuses would be to grant juveniles the right to bail.

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